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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MAJOR EBERHART,  
Petitioner,  
v.  
M. SPEARMAN,  
Respondent.

Case No.[18-cv-02718-JSC](#)

**ORDER TO SHOW CAUSE;  
GRANTING LEAVE TO  
PROCEED IN FORMA PAUPERIS**

(Dkt Nos. 2, 3)

**INTRODUCTION**

Petitioner, a prisoner of the State of California proceeding pro se, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his conviction.<sup>1</sup> Petitioner's application for leave to proceed in forma pauperis is GRANTED due to Petitioner's lack of funds. Because the petition states cognizable grounds for federal habeas relief, a response from Respondent is warranted.

**BACKGROUND**

In 2011, in Contra Costa County Superior Court, Petitioner was convicted of murder, possession of stolen property, and being a felon in possession of a firearm. He was sentenced to a term of 91 years to life in state prison. On appeal, the California Court of Appeal affirmed the judgment, and the California Supreme Court denied review. He filed a habeas petition in the California Court of Appeal, which was denied. His petition for review of that decision was denied by the California Supreme Court. Petitioner then filed the instant federal petition.

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<sup>1</sup> Petitioner has consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). (ECF No. 5.)

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## DISCUSSION

2 I. Standard of Review

3 This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in  
4 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
5 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). It  
6 shall “award the writ or issue an order directing the respondent to show cause why the writ should  
7 not be granted, unless it appears from the application that the applicant or person detained is not  
8 entitled thereto.” *Id.* § 2243.

9 II. Legal Claims

10 Petitioner makes the following claims for relief: (1) the jury instruction on felony murder  
11 was based upon an invalid theory; (2) there was insufficient evidence of first degree murder; (3) he  
12 was subjected to an unduly suggestive identification procedure; and (4) admission of expert  
13 testimony violated his rights under the Confrontation Clause. These claims, when liberally  
14 construed, present cognizable grounds for federal habeas relief.

15 **CONCLUSION**

16 For the foregoing reasons and for good cause shown,

17 1. The Clerk shall serve a Magistrate Judge jurisdiction consent form, a copy of this  
18 Order, and the petition, and all attachments thereto, on Respondent and Respondent’s attorney, the  
19 Attorney General of the State of California. The Clerk also shall serve a copy of this Order on  
20 Petitioner.

21 2. Respondent shall complete and file the Magistrate Judge jurisdiction consent form in  
22 accordance with the deadline provided on the form.

23 3. Respondent shall also file with the Court and serve on Petitioner, within **ninety-one (91)**  
24 **days** of the date this Order is issued, an answer conforming in all respects to Rule 5 of the Rules  
25 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.  
26 Respondent shall file with the answer and serve on Petitioner a copy of all portions of the state  
27 trial record that have been transcribed previously and that are relevant to a determination of the  
28 issues presented by the petition. If Petitioner wishes to respond to the answer, he shall do so by

1 filing a traverse (a reply) with the Court and serving it on Respondent within **twenty-eight (28)**  
2 **days** of the date the answer is filed.

3       4. Respondent may, within **ninety-one (91) days** of the date this Order is issued, file a  
4 motion to dismiss on procedural grounds in lieu of an answer, as set forth in the Advisory  
5 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If Respondent files such  
6 a motion, Petitioner shall file with the Court and serve on Respondent an opposition or statement  
7 of non-opposition within **twenty-eight (28)** days of the date the motion is filed, and Respondent  
8 shall file with the Court and serve on Petitioner a reply within **fourteen (14)** days of the date any  
9 opposition is filed.

10      5. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the Court  
11 informed of any change of address by filing a separate paper captioned "Notice of Change of  
12 Address." He must comply with the Court's orders in a timely fashion. Failure to do so may  
13 result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil  
14 Procedure 41(b).

15      **IT IS SO ORDERED.**

16 Dated: June 6, 2018

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JACQUELINE SCOTT CORLEY  
United States Magistrate Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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MAJOR EBERHART,  
Plaintiff,

7

v.

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M. SPEARMAN,  
Defendant.

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Case No. 18-cv-02718-JSC

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
District Court, Northern District of California.

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That on June 6, 2018, I SERVED a true and correct copy(ies) of the attached, by placing  
said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
receptacle located in the Clerk's office.

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Major Eberhart ID: AI 1194  
High Desert State Prison  
P.O. Box 3030  
Susanville, CA 96127

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Dated: June 6, 2018

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Susan Y. Soong  
Clerk, United States District Court

By:

  
Ada Means, Deputy Clerk to the  
Honorable JACQUELINE SCOTT CORLEY